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IN THE

# Supreme Court of the United States

October Term 1953

No. 18

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GEORGE EARL TOOLSON, *Petitioner*

*vs.*

NEW YORK YANKEES, INC., *et al, Respondents*

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Petitioner's Opening Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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## I.

## Opinions and Judgments in the Courts Below

The Opinion of the District Court was filed November 6, 1951 (R-41-46), 101 Fed. Supp. 93.

The Judgment of the District Court was entered November 28, 1951 (R-47-50).

The Opinion of the Court of Appeals for the Ninth Circuit was filed December 12, 1952. (R-62) 200 Fed. 2nd 198.

The Judgment of the Court of Appeals was entered December 12, 1952. (R-63).

This Court granted petition for certiorari May 25, 1953 (R-65).

## II.

## JURISDICTIONAL STATEMENT

(a) Statutes Giving Jurisdiction

Plaintiff asserts that the Defendants are in violation of the Anti-Trust Statutes.

Sherman Act, 26 Stat. 209 Par. 1, 15 U.S.C.A. Sec. 1,

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . "

and

Sherman Act, 26 Stat. 209 Section 2, 15 U.S.C.A. Section 2,

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor . . ."

By reason of the said activities of the Defendants the Plaintiff has been injured in his business and therefore brings this action for treble damages under section 4 of the Clayton Act., 38 Stat. 731 Section 4, 15 U.S.C.A. Section 15.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall

recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The District Court on Defendant's motion, dismissed plaintiff, petitioners, action on the grounds it lacked jurisdiction of the subject matter of the complaint and on the further grounds that the Complaint does not, nor does any cause of action therein set forth, state a claim upon which relief can be granted.

By virtue of the statute Title 28 U.S.C.A. 1291 plaintiff, petitioner, appealed the final order of dismissal of the District Court to the United States Court of Appeals for the Ninth Circuit. On December 12, 1952, the United States Court of Appeals for the Ninth Circuit affirmed the order of dismissal and the said order was entered that day.

The Jurisdiction of the United States Supreme Court to review the matter on certiorari is invoked under statute title 28, U.S.C.A., Sections 1254 and 2101 (c).

## III.

## Statement of the Matter Involved

The sole question presented to this Court is whether professional baseball is subject to the Federal Anti-Trust Statutes in the United States.

The petitioner, the plaintiff, makes the following allegations in his complaint.

He is a highly skilled professional baseball player. (R-4). The defendants are engaged in the business of producing professional baseball games for exhibition to the general public. The exhibitions are produced by the

various professional clubs, consisting of teams of highly skilled players, such as the petitioner, who are under contract for their services to the Club owning and operating that team, playing games against each other (R-6). In addition to charging the general public a fee to witness the games, the various clubs enter into remunerative contracts by which they cooperate with radio broadcasting and television companies in producing and transmitting the exhibition, by means of radio narration and television pictures, to the outside public situated in the various states of the United States. Radio narration and televising of the games constitute a substantial portion of the business of professional baseball. (R-8).

To facilitate the business of professional baseball, all of the clubs or teams are organized into leagues. Each team then confines its games to those with the other teams of its league. Sixteen of the teams are organized into two leagues of eight teams each, which leagues are called the major leagues. These leagues are the Defendants National League of Professional Baseball Clubs, and The American League of Professional Baseball Clubs. The Defendant, New York Yankees, is a member club of the latter league. All the other teams in professional baseball are organized into leagues, which leagues are designated the minor leagues. Every Minor League is a member of the Defendant National Association of Professional Baseball Leagues. The Defendants, Hollywood Baseball Association and Los Angeles Baseball Club are members of the Defendant Pacific Coast League of Professional Baseball Clubs, which is a member of the Defendant National Association of Professional Baseball Leagues. (R-6-7).

Petitioner alleges in three separate causes of action that the defendants are in violation of the Sherman Act. 26 Stat. 209. The first cause of action alleges that the defendants have entered into or agreed to be bound by a contract in restraint of interstate commerce (R-9). The second cause of action alleges that the defendants have entered into a combination and conspiracy in restraint of interstate commerce (R-12). The third cause of action alleges that the defendants have combined together to monopolize professional baseball in the United States. (R-13).

The facts of these alleged violations of the Anti-Trust statutes are practically common to all three causes of action. Petitioner asserts that the defendants have agreed Major League player-club contracts must be uniform and the Minor League player-club contract must be uniform, and that each player's contract provides that it shall inure to the benefit of the clubs assignee; that the club or its assignee shall have an option at the end of each year to renew the player's contract and that the player shall not play for any other club but the club which he has a contract or the assignee thereof; that before a certain date each year, each club shall designate a reserve list of active and eligible players which it desires to reserve for the ensuing year, and that no player on such a reserve list shall thereafter be eligible to play for any other club until his contract has been assigned to that club, or until he has been released; that the player shall be bound by any assignment of his contract, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ability; that any player who violates this contract or reservation, or who participates in

e game with or against a club containing an ineligible player shall be considered ineligible and placed on the ineligible list; that an ineligible player must be reinstated before he can be released from his contract; that no club shall tender contracts to ineligible players, and that no club may release unconditionally an ineligible player unless he is first reinstated from the ineligible list. (R-9-10).

In addition it is alleged that the defendants have agreed that only certain cities shall constitute the circuits of the Major Leagues; that the circuits established shall remain unchanged unless approved by a majority of the clubs in that league; and that the circuits of either Major League may not be changed without unanimous consent of the clubs of that league. As to radio and television Defendants have further agreed that each Major League Club may broadcast or telecast its games from a station in its home territory; that no Major League club shall authorize a broadcast or telecast of any of its games from a station outside its home territory and within the home territory of any other baseball club, without the consent of such other clubs. As additional control of the player the Defendants have further agreed that no player shall participate in any exhibition games with or against any team which, during the current season or within one year, which has had any ineligible player or which is, or has been during the current season or within one year, been managed or controlled by an ineligible player or by any person who is listed as an ineligible player under an assumed name or who has otherwise violated, or attempted to violate any exhibition game contract; that no club controlling its park shall allow its park to be used for

any game involving violation of the said contract and agreement; that all contracts made by a club for the use of its facilities or games shall stipulate that the teams participating in such games shall not use any ineligible players. (R-13-15).

With regard to the minor leagues, the Defendants have agreed that the existing circuits of the minor leagues shall not be so changed as to include any city in the Major Leagues without the written consent of the league concerned; that certain indebitedness of each Club shall become liens against the territory that club represents and a league membership shall not be extended to any Club in said city until such debts are discharged; that each league shall have control of its territory until its membership is terminated; that territorial protection of each member club shall cover the entire area within 10 miles in all directions from the city limits of the protected city; that no club or league party to this agreement nor any player under control of such club shall be allowed to play or participate in any games within the territorial limits of any other club member of any other league party franchise operating in said territory and without the consent of the president and directors of the league of which said protected club is a member, nor shall an additional franchise within such protected territory be granted without such consent; that each club may broadcast or telecast from stations located within its home territory but not otherwise and the visiting club may with the consent of the home club, broadcast or telecast to its home territory from stations within its home territory; that the word home territory shall mean and include, with respect to any baseball club, the territory included within the circum-

ference of a circle having a radius of 50 miles with its center at the baseball park of such baseball club; that the protection given territorial rights of each club, as hereinafter set forth, shall be deemed to include protection against broadcasts and telecasts other than those disseminated by a station in the home territory of the other clubs; that no player shall be permitted to play baseball during the playing season of the Club to which he is under contract or reservation in any tournament or game not under the supervision of the National Association of Professional Baseball Leagues. (R-15-18).

The said agreement further provided that any club, party to or identified with this agreement, which shall enter into any negotiation to become a member of, or in any way cooperate with, any organization of professional baseball clubs whose existence will in any manner conflict with the letter and spirit of this agreement, or the interests of any of the clubs operating under it, shall thereby automatically forfeit all rights and privileges conferred by this agreement, including membership in any league party to this agreement, and all right to hold and/or reserve players' contracts. (R-18).

Plaintiff asserts further in his second cause of action, that the Defendants and those combined with them in said illegal combination have acted in full accord and fidelity with the terms of the agreement set forth heretofore; that by reason of the combination thereunder the Defendants, and those combined with them in said illegal combination, control and own all of the players in professional baseball, and control all of the teams in Professional Baseball and control all the games and exhibitions thereof, including exhibition by radio and television

among the several states of the United States; that as a result of said combination the Defendant baseball clubs and those combined with them refuse to authorize a radio broadcast of such games to be made from the radio stations located outside the home territory of that club and within the home territory of another club, during the time that such other club is playing a home game, unless such other club has prior thereto consented to the broadcasts of said game or of any game of another club of a comparable league, during said time from a station located within its home territory; that as a result of said combination Defendant Baseball Clubs and those combined with them have refused to authorize a telecast of the games of such clubs to be made from a station located outside of the home territory within the home territory of another club, during the time that (a) a home game of such other club is being played or (b) an away from home game is being telecast from any television station or stations located within the home territory of such club, unless such other club has prior thereto consented to the telecast of said games or of any game of another club in a comparable league, during said time from a station located within its home territory; that within said combination the words home territory mean and include, with respect to any baseball club, the territory fifty miles, with its center at the baseball park of such baseball club. (R-36-38).

Plaintiff claims that, as a result of such combination, the Defendants, and those combined with them, have greatly lessened and eliminated all competition in the exhibition of baseball games by means of broadcasting and televising among the several states; that the place, time, quality

of games exhibited, area within which said exhibit is to be sent has been and are strictly controlled by Defendants and by those combined by them in said illegal combination; by reason of the foregoing Defendants and those combined with them have illegally restrained interstate commerce in the exhibition of baseball games, that competition therein is greatly lessened and destroyed and an illegal monopoly has been established all in violation of the antitrust laws of the United States. (R-38) (R-40).

The Defendant New York Yankees, Inc., owned and controlled both the Defendant Newark International Baseball Club, Inc., and the Defendant Binghamton Exhibition Company, Inc. (R-6). Plaintiff was under contract to the Defendant Newark International Baseball Club, Inc., which was a class AAA Club, and that club assigned his contract to the Defendant Binghamton Exhibition Company, Inc., a class A team. The Plaintiff refused to report to said assignee and the Defendant George M. Trautman, President of the Defendant National Association, of Professional Baseball Leagues, placed him on the ineligible list where Plaintiff was, and still is held. (R-11). By reason of Plaintiff being on said list the Defendant and each of them have refused since May 25, 1950, to allow the Plaintiff to play professional baseball. (R-11).

By reason of being placed on the incligible list and the consequent refusal of the Defendants to allow the petitioner to play professional baseball, petitioner has been deprived of his means of livelihood. (R-11-13-19). Having thus been injured in his business by activities forbidden by the antitrust laws, petitioner under the provisions of Section 4 of the Clayton Act, 38 Stat. 731, Section 4,

15, on May 1, 1951, brought this action for treble damages in the United States District Court, Southern District of California, Central Division. (R-3).

The Defendants, respondents, moved to dismiss the petitioner's complaint on the grounds that the Court lacked jurisdiction over the subject matter of the cause of action, and that the complaint, and each cause of action therein, failed to state a claim against Defendants upon which relief could be granted. (R-25-29).

The District Court granted the Defendants motion and dismissed the Plainfiff, petitioners, action on November 27, 1951. (R-47). On December 12, 1951 Plaintiff, petitioner, filed notice of appeal to the United States Court of Appeals for the Ninth Circuit from the order of dismissal of the District Court. (R-50). On December 12, 1952, the Court of Appeals affirmed the order of the District Court dismissing petitioners action. (R-63). On May 25, 1953, this Court granted petition for certiorari. (R-65).

## IV.

## Specifications of Errors

The only error urged in this matter is that the District Court and Court of Appeals are in error in holding that the District Court does not have jurisdiction of the subject matter of this action.

## SUMMARY OF ARGUMENT

1 The single question presented here is whether the activities and organization of professional baseball are within the scope and meaning of the Federal

Anti-Trust Laws. The scope of the Federal Anti-Trust Laws is commensurate with the scope of the Federal power under the Commerce Clause of the Constitution. Thus our question is whether organized professional baseball is within the scope of the Commerce Clause.

II Interstate Commerce, or an activity within the scope of the Commerce Clause, is any traffic or intercourse concerning more than one state. The purpose of the Commerce Clause was to give the Federal Government power to govern affairs the separate states could not effectively control because of the individual states' limited territorial jurisdiction.

III The case of *Federal Baseball Club v National League* (1922) 259US200 holding professional baseball sport not trade and a purely state affair is erroneous. Modern Professional Baseball is certainly within the scope of the Commerce Clause.

IV Baseball is beyond effective state control. Interstate travel is essential to baseball and not just incidental. The baseball industry is comparable to the moving picture industry.

V The Advent of Radio and Television leave no doubt that Baseball is now engaged in interstate commerce.

VI The owning and controlling of baseball players by the teams under the Reserve Clause is so obnoxious to the principles of the Thirteenth Amendment to the Constitution that baseball should be held within the scope of the Federal Anti Trust laws if possible.

I.

## Question Presented

The Single Question Presented.

(a) The single qestion presented by the case at bar is whether the United States District Court has jurisdiction of the subject matter of this action. In direct application are the activities and organization of professional baseball subject to the Federal Anti-Trust Laws? In other words, are these activities and this organization within the scope and meaning of the Anti-Trust Laws?

SHERMAN ACT, 26 Stat. 209 Par 1, 15 U.S.C.A. Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . "

and

SHERMAN ACT, 26 Stat. 209 Sec. 2, 15 U.S.C.A. Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor. . . . "

Scope of the Federal Anti-Trust Laws.

(b) In determining the scope and meaning of the Federal Anti-Trust Laws we must first recognize that these laws were passed under the specific power granted to Congress, by Article 1, Section 8, of the United States Con-

stitution, to regulate Commerce among the several States. The meaning and scope of the Anti-Trust Laws must necessarily be limited by the scope of that power. (*Atlantic Cleaners and Dyers v. United States*, 286 US 427, 434 76 L ed 1204, 1208).

However, the Congressional intent in enacting the Anti-Trust Laws was to use the Federal powers to the fullest possible extent. Congress did not impose any of its own restrictions on the scope, meaning and power of those laws. Thus the only restrictions on the scope of the Anti-Trust Laws are the Constitutional restrictions on the Federal Power. The scope and jurisdiction of the Anti-Trust Laws is commensurate with scope and meaning of the Commerce Clause of the Constitution.

Representative Stewart, delivering the last speech preceeding the unanimous adoption of the present Act, stated " . . . . The provisions of this trust bill are just as broad, sweeping and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States. . . . " (21 CONG. REC. 6314).

This Court has recognized that Congressional intention. Mr. Justice Sutherland states in *Atlantic Cleaners and Dyers v. United States*, (supra) at page 435:

> "A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and

conspiracies in restraint of trade, and to that end to exercise all the power it possessed."

*Atlantic Cleaners and Dyers v. United States*, 286 US 427, 435 - 76 L ed 1204, 1208.

The cases leave no doubt as to this construction of the scope of the Anti-Trust Laws.

See:

*Apex Hosiery v. Leader*, 310 US 469, 495 (1940).

*United States v. South-Eastern Underwriters Asso.*, 322 US 533, 558 (1944),

*United States v. Frankfort Distilleries*, 324 US 293, 298 (1945).

Question Stated.

(c) Our question thus resolves itself to whether the activities and organization of professional baseball are within the scope of the Federal power under the Commerce Clause.

## II

**THE SCOPE OF THE COMMERCE CLAUSE—WHAT IS COMMERCE AMONG THE STATES?**

(a) In general:

In *United States v. South-Eastern Underwriters Asso.*, (supra) at page 550 it is stated:

"The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. (US) 1, 189, 190, 6 L ed 23, 68, 69. 'Commerce undoubtedly. is traffic,

but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . . ' Commerce is interstate, he said, when it 'concerns more States than one.' Id, 9 Wheat. (US) 194, 6 L ed 69. No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause. To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the States."

*United States v. South-Eastern Underwriters Asso.* 322 US 533, 595 (1944).

No better understanding of the meaning of interstate commerce—or the scope of the Commerce clause can be gained than through a full understanding of the purpose of the Commerce clause within the Constitution.

What is the purpose of this Federal power?

*United States v. South-Eastern Underwriters Asso.*, (supra) at 551:

"The power confined to Congress by the Commerce Clause is declared in the Federalist to be for the purpose of securing the 'maintenance of harmony and proper intercourse among the States.' But its purpose is not confined to empowering Congress with the negative authority to legislate against state regulations of commerce deemed inimical to the national interest. The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state bound-

aries, affect the people of more states than one;—*to govern affairs which the individual states, with their limited territorial jurisdiction, are not fully capable of governing.* This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is eqaully essential to the welfare of that Nation."

*United States v. South-Eastern Underwriters Assoc.*, 322 US 533, 595 (1944) (emphasis ours).

(b) Factual holdings of what is within Scope of Commerce Clause:

We cannot state the matter more clearly than Justice Black did in *United States v. South-Eastern Underwriters Asso.*, (supra) at 549 (88 L ed 1455):

"The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. Lottery case *(Champion v. Ames)* 188 US 321, 355, 47 L ed 492, 500, 23 S Ct 321. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke v. United States*, 227 US 308, 320-323, 57 L ed 523, 526-528, 33 S Ct 281, 43 LRA (NS) 906, Ann Cas 1913E 905; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States v. Simpson*, 252 US 465, 64 L ed 665, 40 S Ct 364, 10 ALR 510; to drive a stolen

automobile from Iowa to South Dakota, *Brooks v. United States*, 267 US 432, 436-439, 69 L ed 699, 700-703, 45 S Ct 345, 37 ALR 1407. Diseased cattle ranging between Georgia and Florida are in commerce, *Thornton v. United States*, 271 US 414, 425, 70 L ed 1013, 1018, 46 S Ct 585, and the transmission of an electric impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 US 1, 11, 24 L ed 708, 711."

*United States v. South-Eastern Underwriters Assoc.*, 322 US 533, 595 (1944).

To these illustrations we can add:

Acting as a clearing house for domestic and foreign news, *Associated Press v. National Labor Relations Board*, 301 US 103; intra state railroad rates, SHREVEPORT RATE CASES, 234 US 342; production of wheat on a farm for consumption on that farm, *Wickard v. Filburn*, 317 US 111, national advertising in local papers, *Lorain Journal Co. v. United States*, 342 US 143.

Again as stated in *United States v. South-Eastern Underwriters Asso.*, (supra) at 549:

"Not only then may transactions be commerce though non commercial; they may be commerce though illegal and sporadic, and though they do not concern anything more tangible than electrons and information."

*United States v. South-Eastern Underwriters Asso.*, 322 US 533, 595 (1944) at 549.

## III

**THE CASE OF FEDERAL BASEBALL CLUB v. NATIONAL LEAGUE (1922) 259 U.S. 200.**

However, this Court has held that professional baseball is sport not trade—that the business of baseball is giving exhibitions which are purely state affairs and transportation is a mere incident not the essential thing.

*Federal Baseball Club v. National League* (1922) 259 US 200.

That decision is wrong and must be overruled. This Court has not hesitated to recognize and overrule an erroneous decision when that error is recognized. *(United States v. E. C. Knight Co.*, 156 US 1—*Hammer v. Dagenhart*, 247 US 251).

(a) *The Basic Underlying Error in The Federal Base-Case:*

Justice Holmes stated that the decision of the Court of Appeals (269 FED 681) went to the root of the case. For its criterion or formula of what is commerce that decision relied on the criterion and formula set forth in *Paul v. Virginia*, 8 Wall 168, and *Hooper v. California*, 155 US 648 (see 269 Fed. 681 at 685). In his own decision in the Federal Baseball case Justice Holmes relied on the rationale of *Hooper v. California* (supra) (see 259 US 200 at 209).

Both *Paul v. Virginia* and *Hooper v. California* were cases involving insurance where it was held that insurance was not trade or commerce, thus state acts regulating insurance were not invalid because they invaded the federal power under the commerce clause.

In the Paul and Hooper cases it is held:

(1) issuing a policy of insurance is not commerce;

(2) the business of insurance is not commerce;

(3) Making such a contract is a mere incident of commerce;

(4) and though the parties may be domiciled in different states the transportation is incidental.

Of course the rationale of the Federal Baseball case and of the respondents at bar is identical to that of the Paul and Hooper cases being that baseball is sport not commerce, and that the interstate transportation involved is merely incidental.

That rationale may be correct and the decision not in error when the question is one of upholding State powers, but when that rationale is used to strike down the Federal power it is incorrectly used.

As the Court stated in *United States v. South-Eastern Underwriters Asso.*, (supra) at 544:

> "In all cases in which the Court has relied upon the proposition that 'the business of inurance is not commerce,' its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early

as 1866 the insurance trade, though still in its infancy, was subject to widespread abuses. To meet the imperative need for correction of these abuses the various state legislatures, including that of Virginia, passed regulatory legislation. *Paul v. Virginia* upheld one of Virginia's statutes. To uphold insurance laws of other states, including tax laws, *Paul v. Virginia's* generalization and reasoning have been consistently adhered to.

"Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause."

*United States v. South-Eastern Underwriters Asso.*, 322 US 533, 595 (1944) at 544.

The Supreme Court in the Federal Baseball Case (supra) in 1922 applied the rationale and guides developed in the *Paul v. Virginia* (supra) and *Hooper v. California* (supra) cases—not to sustain a state statute—but to strike down the applicability of an act of Congress. It did then exactly what this Court refused to do in the *United States v. South-Eastern Underwriters Asso.*, case (supra). Applying the formula of what is the Fed-

eral power, not what is the state power, gives an entirely different result in the Federal Baseball Club case (supra) as we will show.

(b) Modern Professional Baseball is within the scope of the Commerce Clause.

(1) Before making a factual application of the law to Professional Baseball let us briefly describe it.

The Sub-committee on Study of Monopoly Power, House of Representatives, Eighty-second Congress, describes organized professional baseball as follows:

> " 'Organized Baseball' is a combination of approximately 380 separate baseball clubs, operating in 42 different States, the District of Columbia, Canada, Cuba, and Mexico (the Baseball Bluebook, (1951) pp. 18-20). Affiliated with this combination are winter leagues operating in Cuba, Panama, Puerto Rico, and Venezuela.
>
> "Inherently, professional baseball is intercity, intersectional, and interstate. At the beginning of the 1951 season, the clubs within organized baseball were divided among 52 different leagues. Each league is an unincorporated association of from 6 to 10 clubs which play championship baseball games among themselves according to a prearranged schedule. Such a league organization is essential for the successful operation of baseball as a business. . . .
>
> "Of the 52 leagues associated with organized baseball in 1951, 39 were interstate in nature. All of the higher minor leagues and both of the major leagues included clubs representing cities in more than one State.

| *Classification* | *Interstate* | *Intrastate* |
|---|---|---|
| Major leagues | 2 | 0 |
| AAA leagues | 3 | 0 |
| AA leagues | 2 | 0 |
| A leagues | 4 | 0 |
| B leagues | 7 | 2 |
| C leagues | 10 | 3 |
| D leagues | 11 | 8 |

"Like motion pictures, the actual baseball exhibitions are local affairs. But essential to the giving of these exhibitions are numerous interstate activities.

"All leagues in organized baseball are associated together by the Major League Agreement, Major-Minor League Agreement, and National Association Agreement. These agreements require all member clubs to adopt a uniform players' contract, which is prescribed and prepared by the Major League Executive Council and the president of the national association. Players are required to consent both to the assignment and to the annual renewal of their contracts at the option of the club (Major League Rules 3(a) and 9(a); Major-Minor League Rules 3(a) and 9(a); National Association Agreement, secs. 15.01 and 24.01). Under these provisions the player contract itself may be sold or exchanged. These contracts in fact are sold or traded among clubs within a league and among clubs of different leagues through the media of interstate commerce. The prices paid for the assignment of these contracts sometimes exceed $100,000.

"The primary sources of revenue for baseball clubs are admissions, radio and television, and concessions. . . . .

"Admissions still constitute the bulk of major league clubs' revenue although the proportion of revenue from all admissions has demonstrated a steady decline through the years. In connection with its source of revenue, it may be noted that approximately one-fourth of clubs' receipts from admissions are derived from road games and exhibition games which are usually played outside the clubs' home states.

"The fastest-growing source of revenue for major league clubs is radio and television. Receipts from these media of interstate commerce were non-existent in 1929. In 1939, 7.3 percent of the clubs revenue came from this source; and in 1950, this share rose to 10.5 percent.

"Portrayed in absolute terms, the growing importance of radio and television becomes even more pronounced. Receipts rose from nothing in 1929 to $884,500 in 1939 and $3,365,500 in 1950. Reported income from primary radio and television contracts for 1951 indicate that this sharp increase is continuing. Copies of these contracts submitted to the subcommittee reveal that the 16 major league clubs in 1951 received a minimum of $4,561,312.50 from radio and television sponsors or stations. American League clubs reported $1,778,412.50; National League clubs, $1,598,900. To this must be added $110,000 for the sale of radio and television rights to the 1951 all-star game and $1,075,000 for the sale

of similar rights to the 1951 world series. These receipts are divided equally among the clubs for application toward the players' pension fund.

"Rivalling radio and television receipts for importance as a source of revenue are concessions, which include the sale of such merchandise as peanuts, popcorn, hot dogs, soft drinks and beer.

"Other miscellaneous sources of revenue in the major leagues include stadium rental, stadium advertisements, score-card advertisements, and the sale of score cards, sketch books, pictures, and other mementos.

"Pragmatically, organized baseball is not amenable to effective State regulation. As stated above, most baseball leagues include cities in more than one State. These 52 leagues in turn are combined in an association which embraces 42 states and six foreign countries. Individual games, while conducted wholly within a State, are inseparable elements of the larger pennant race, which is dependent for its success upon interstate activities. Baseballs, bats, player uniforms, and other paraphernalia are purchased through the channels of interstate commerce. Team personnel in traveling from one city to another to complete the playing schedule must use railroads, airplanes, or other means of interstate commerce."

SUB-COMMITTEE ON STUDY OF MONOPOLY POWER, COMMITTEE OF THE JUDICIARY, HOUSE OF REPRESENTATIVES, EIGHTY-SECOND CONGRESS, REPORT, page 4.

And again on page 12 of the report:

"Public interest in organized baseball is not limited to attending baseball games. Radio, television, newspapers, and magazines regularly feature not only the games but also every detail of the management of the business and of the personal lives of the players. Mutual Broadcasting System estimated that 69,000,000 persons in the United States listened to one or more of the 1951 World Series Games (Sporting News, October 31, 1951, p. 21). The Sporting News, a newspaper which has been almost exclusively devoted to professional baseball for 65 years, has a weekly circulation of 325,000 and is read by over 1,500,000 fans each week. No other business enterprise, including any of the basic industries, receives so much attention from the daily press. As Philip K. Wrigley, president of the Chicago National League club, summarized the situation, 'Baseball is doing business in a goldfish bowl.'"

Another concise description of the interstate factors in organized baseball is found at page 610 of "Monopsony In Manpower: Organized Baseball meets the Anti-Trust Laws" by Peter S. Craig, appearing in Volume 62, No. 4 of the Yale Law Journal.

(2) We have pointed out above the basic error in the policy and approach of the Court which resulted in the Federal Baseball case (supra) decision in 1922.

The error of the case becomes ever more apparent as we see the arguments used under that policy approach applied to the facts.

On page 208 of the Federal Baseball case (supra) the Court states:

> "The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have acheived, competitions must be arranged between clubs from different cities and states. But the fact that in order to give the exhibitions, the Leagues must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business."
>
> *Federal Baseball Club v. National League* 259 US 207, 208)

The correct answer is as shown in *United States v. South-Eastern Underwriters Asso.* (supra) at 546:

> "We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. *Cf. Hall v. Geiger-Jones Co.* 242 US 539, 557, 558, 61 L ed 480, 492, 493, 37 S Ct. 217, LRA 1917F 514, Ann Cas 1917C 643. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. *Swift & Co. v. United States,* 196 US 375, 398, 49 L ed 518, 525, 25 S Ct 276. In short, a nationwide

business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce." *United States v. South-Eastern Underwriters Asso.*, 322 US 533, 595 (1944) at 546.

And again if the Federal Baseball Case rationale were correct this Court could not have made the following holding in

*Lorain Journal Co. v. United States*, 342 US 150 at 151:

"There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. *Associated Press v. United States*, 326 US 1, 14, 89 L ed 2013, 2027, 65 S Ct 1416; *Associated Press v. National Labor Relations Board*, 301 US 103, 81 L Ed 953, 57 S Ct 650. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments, to say nothing of the interstate commerce involved in the sale and delivery of products sold. The decision in *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 US 436, 64 L ed 649, 40 S Ct 385, related to the making of contracts for advertising rather than to the preparation and dissemination of advertising. Moreover, the view there stated, that the making of contracts by parties

outside of a state for the insertion of advertising material in periodicals of nation-wide circulation did not amount to interstate commerce, rested expressly on a line of cases holding 'that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse.' Id., 252 US at 443, 64 L ed 653, 40 S Ct 385. See *Paul v. Virginia* (US) 8 Wall, 168, 19 L ed 357, and *New York Life Ins. Co. v. Deer Lodge County*, 231 US 495, 58 L ed 332, 34 S Ct 167. That line of cases no longer stands in the way. *United States v. South-Eestern Underwriters Asso.* 322 US 533, 88 L ed 1440, 64 S Ct 1162. See also, *North American Co. v. Securities & Exchange Com.* 327 US 686, 90 L ed 945, 66 S Ct 785; *Indiana Farmer's Guide Pub. Co. v. Prarie Farmer Pub. Co.* 293 US 268, 79 L ed 356, 55 S Ct 182.

"The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved."

*Lorain Journal Co. v. United States*, 342 US 150, at pages 151 and 152.

In the Federal Baseball Case (supra) the Court further stated at page 209:

"According to the distinction insisted upon in *Hooper v. California*, 155 US 648, 655, 39 L ed 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, the transport is a mere incident, not the essential

thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce, does not become commerce among the states because the transportation that we have mentioned takes place."

*Federal Baseball Club v. National League,* 259 US 900.

The inaptness of that argument where the Federal power under the commerce clause is involved is perhaps best shown in *Mandeville Island Farms v. American Crystal Sugar Co.,* 324 US 219, 92 L ed 1328 at 229:

"The broad form of respondent's argument cannot be accepted. It is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power, *Wickard v. Filburn,* 317 US 111, 87 L ed 122, 63 S Ct 82, or the scope of the Sherman Act's coverage. The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute.

"It is true that the first decision under the Sherman Act applied those mechanical distinctions with

substantially nullifying effects for coverage both of the power and of the Act. *United States v. E. C. Knight Co.* 156 US. 1, 39 L ed 325, 15 S Ct 249. Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving 'primarily' only 'production' or 'manufacturing', although the vast part of the sugar produced was sold and shipped interstate, and this was the main end of the enterprise. The interstate distributing phase, however, was regarded as being only 'incidentally', 'indirectly', or 'remotely' involved; and to be 'incidental', 'indirect', or 'remote' was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. See *Wickard v. Filburn,* supra, (317 US at 119 et seq., 87 L ed 131, 63 S Ct 82).

"The Knight decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal."

*Mandeville Island Farms v. American Crystal Sugar Co.*, 324 US 219 at 229.

The respondents would perpetuate the error here by focusing all of our attention on the game itself—they ask us to ignore all else. The baseball exhibition—is plainly a portion of a vast nationwide business and international organization conducted for profit. "No commercial enterprise *of any kind* which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause." *(United States v. South-Eastern Underwriters Asso.*, supra, at page 553). Certainly then the vast business of baseball is within the federal jurisdiction as opposed to the decision in the Federal Baseball Case.

## IV

## POSITIVE APPROACH

(a) Baseball is beyond effective state controls.

(a) Organized baseball with its 380 odd teams and 52 leagues stretching over all of the 48 states and six foreign countries is an affair which the individual states with their limited territorial jurisdictions are not fully capable of governing. The purpose of the Commerce Clause was to provide for effective control of such an organization and activity. *(United States v. South-Eastern Underwriters Asso.*, supra). To hold this organization within the federal jurisdiction is in perfect accord with the purpose of the grant of power to the Federal Government contained in the Commerce Clause. Proof of this is the fact that in 75 years of existence or-

ganized professional baseball has been almost completely self-regulated, having developed a super government without substantial State or Federal interference. (Page 7 Subcommittee on Study of Monopoly Power, House of Representatives, Report, supra).

(b) Interstate Travel is essential not incidental to baseball.

(b) In the Spring of the year the northern baseball clubs travel south for their spring training. At the close of this training, the teams make a barnstorming tour toward their home along the way they play exhibition games. All of this involves travel among the states. Finally, during the playing season, each team must meet rigid schedules which require a vast amount of interstate travel.

This traveling is not incidental to baseball but an absolute essential. This travel is as essential to baseball as interstate transportation is to the sugar industry. *Mandeville Island Farms v. American Crystal Sugar Co.*, supra). Both baseball and the sugar industry could confine their activities to one state, neither would survive. Interstate transportation has become essential to their very existence, and they are both subject to Federal power under the Commerce Clause.

Travel is no more incidental to the baseball game than it is to sugar. Neither the baseball game nor sugar are commerce. However, they are but parts of a chain of events—of an entire transaction—that becomes interstate commerce. *(United States v. South-Eastern Underwriters Asso.*, supra)

The baseball organization (league or team) requires extensive interstate communications for all sorts of commercial negotiations. (Players contracts, game scheduling, all types of league business). Without this constant exchange of information and materials—without this interstate communications of a business nature baseball could not exist. Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution. (*The Associated Press v. National Labor Relations Board*, supra).

Interstate Commerce—traffic among the states is certainly essential, not incidental to organized professional baseball.

(c) Baseball Industry is Comparable to the Moving Picture Industry.

(c) The moving picture industry has been held subject to the Anti-Trust Laws because of the interstate distribution of motion picture films. *Binderup v. Pathe Exchange, Inc.*, 263 US 291 — *Paramount Famous Lasky Corp v. United States*, 282 US 30; *Bigelow v. R.K.O. Radio Pictures*, 327 US 251). Baseball is essentially the same and no distinction should be made. The immediate, purported distinction is that a motion picture film is a commodity—it is leased, transported and delivered in interstate commerce, while the game of baseball is a local affair and any necessary travel is but incidental. The distinction is without basis. Both the baseball game and the projection of the motion picture film are local affairs. Interstate travel is no less essential or more incidental to one than the other. The integrated controlled baseball

club with its players and equipment is as much a commodity in commerce as a motion picture film. The motion picture is entertainment (yet the industry is subject to the Anti-Trust Laws), the baseball game is sport and organized professional baseball is also subject to the Anti-Trust Laws.

Neither the baseball game or the projection of the motion picture film is susceptible of being transferred. The film and the baseball team must both travel in interstate commerce. The film in combination with a theatre and a projection machine produces an exhibition which is entirely local in beginning and end. The baseball team in combination with a stadium and another team produces an exhibition local in character. There simply is no valid distinction between the motion picture cases and the baseball situation.

In *Ring v. Spina,* 148 Fed 2d 647, a musical comedy on the road was held to be within the scope of interstate commerce. We contend baseball to be exactly comparable, and this is obvious from the Court's concise description of the traveling musical comedy.

*Ring v. Spina* (supra) at 650:

"Employment contracts for separate exhibitions seem to us quite different from the substantial business of readying a musical comedy through tryouts on the road for New York production. There must be the securing of services of countless actors, actresses, members of choruses, and others, of scenery music, and appropriate lighting, then the strenuous activities required to weld all these parts into a delectable whole, the judicious advertising, and all the

other details to such a production, so extensive in fact that it seems not unusual for a single play to be separately incorporated as a business corporation. And the road tryouts—here, from New Haven to Boston to Philadelphia—are an essential part of the fashioning of a perfect product for the Broadway trade."

*Ring v. Spina*, 148 Fed 2d 647 at 650.

and with reference to the comparison between the traveling musical comedy (and we contend professional baseball) and the moving picture cases the Court stated:

*Ring v. Spina* (supra)

"The Supreme Court has not hesitated to regard the distribution of motion picture films as interstate commerce, *Interstate Circuit, Inc. v. United States*, 306 US 208, 59 S Ct 467, 83 L ed 610; *Paramount Famous Lasky Corp. v. United States*, 282 US 30, 51 S Ct 42, 75 L ed 145; *United States v. First Nat.* Pictures 282 US 44, 51 S Ct 42, 75 L ed 145; *Binderup v. Pathe Exchange, Inc.* 263 US 291, 44 S Ct 96, 68 L ed 308; and it would seem invidious to draw a different conclusion as to a stage production."

*Ring v. Spina*, 148 Fed 2d 647 at 651.

There are several cases, *Hart v. B. F. Kieth Vaudeville Exchange*, 12 Fed 2d 341 — *Neugen v. Associated Chautauqua Co.*, 70 Fed 2d 605 and *Conley v. San Carlo Opera Co.*, 163 Fed 2d 310, which are based entirely on the rationale and precedent of the Federal Baseball case. On that basis petitioner deems them not worthy of comment since arguing them in support of the Federal Base-

ball decision would be merely for respondents to be lifting themselves by their own boot straps.

(d) Artificial Labeling Erroneous.

(d) Any defense to the holding of the Federal Baseball case (supra) or cases based on it must be, as the proponents of those cases and the respondents here assert, one of dissecting the whole activity into separate individual portions. Then you emphasize each portion and label it — trade, commerce, sport, wholly local activity or interstate. It is clear, however, that this artificial and mechanical dissecting and labeling without regard to the economic continuity between the various elements is entirely misleading and erroneous. (*Mandeville Island Farms v. American Crystal Sugar Co. (supra)*. These artificial mechanical labels do not make the court powerless to examine the entire transaction of which the labeled thing is but a part in order to determine whether there may be a chain of events which becomes interstate commerce.

This Court has stated this proposition in another way in *Mandeville Island Farms v. American Crystal Sugar Co.* (supra) at page 234:

> "In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing

> of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision."
>
> *Mandeville Island Farms v. American Crystal Co.* 334 US 219-249 at page 234.

Obviously then it becomes unnecessary to argue whether the baseball game itself—the exhibition—is commerce—sport, trade, interstate or intrastate. The sum of the facts presented here show a substantial effect upon interstate commerce and the matter is clearly within scope and meaning of the Anti-Trust Laws.

## V

## RADIO AND TELEVISION

(a) Baseball's Relation to Radio and Television.

(a) So far petitioner has argued this matter ignoring the tremendously important changes wrought since 1922 and the Federal Baseball Case by Radio and Television broadcasting. These changes have not been immaterial to baseball.

The House Subcommittee Report shows that in 1929 nothing was received by way of revenue from radio and television by the major leagues. By 1939 the Major Leagues alone received $884,500 or 7.3% of their revenue from radio and television. In 1950 the major leagues received 10.5% of their revenue or $3,365,500 from these

sources. A very sharp increase in these revenues is continuing. Mutual Broadcasting System estimated that 69,000,000 persons in the United States listened to one or more of the 1951 World Series games. (Sporting News, Oct. 31, 1951, page 21). Radio and television rights to the 1951 World Series were valued at $1,075,000 alone.

There can be no question now that professional baseball is interstate commerce. No longer is the giving of an exhibition of professional baseball a purely state affair. The interstate exhibition of baseball games by radio and television requires the simltaneous cooperation and effort of the baseball organization and the radio and television companies. That whole effort of production is in interstate commerce.

Judge Learned Hand in the case of *Gardella v. Chandler*, 172 Fed 2d 402, at page 407, states this proposition quite clearly:

> "Whether every department store is engaged in interstate commerce is a question I shall not undertake to answer; and this I may do, because the defendants' relation to broadcasting and television is quite different. The contracts with the companies are mutual arrangements in which each contributes its share to a common venture; the defendants furnish the spectacle and give the companies leave to enter and set up their apparatus on the grounds, by means of which they transform for transmission the air and light waves, which come from the playing-grounds and the players, or from the narrator who reports the game; and the transformed waves they

send abroad either in a form for direct reception or otherwise. This interposition is of course necessary, when the auditory is at a distance; but for our purposes the result seems no different from direct transmission; and the situation appears to me the same as that which would exist at a 'ball-park' where a state line ran between the diamond and the grandstand. Nor can the arrangements between the defendants and the companies be set down as merely incidents of the business, as were the interstate features in *Federal Baseball Club vs. National League,* supra. On the contrary, they are part of the business itself, for that consists in giving public entertainments; the players are the actors, the radio listeners and the television spectators are the audiences; together they form as indivisible a unit as do actors and spectators in a theatre. I am therefore in accord with my brother Frank that the defendants are pro tanto engaged in interstate commerce."

*Gardella v. Chandler,* 172 Fed 2d 402, at 407.

(b) Radio and Television Are Changes in Kind From Telegraphy.

(b) Respondents have pointed out that at the time of the Federal Baseball case play by play accounts of the games were telegraphed over the nation and that this factor had been argued to the Court. At that time it had long been established that the telegraph was an instrumentality of Interstate Commerce. However, as Judge Frank pointed out in *Gardella v. Chandler,* 172 Fed 2d 402, those facts do not make that decision a precedent on the question of interstate communication presented here.

"True, in the Federal Baseball Club case, there was present in the record the fact that the defendants had sold the exclusive right to send 'play-by-play' descriptions of the games over interstate telegraph wires. But the brief of the plaintiff filed in the Supreme Court in that case did not contend that that interstate communication was interstate commerce; it merely called attention to the telegraph service as one of several factors tending to show the popularity and national character of 'organized baseball'. Moreover, the Supreme Court in its opinion in that case did not note the fact concerning the telegraph service; and it has often been held that a decision is not to be regarded as a precedent concerning a question clearly not considered by the Court, because 'to make it so, there must have been an application of the judicial mind to the precise question***'."

*Gardella v. Chandler,* 172 Fed 2d 402, at 411.

And discussing further the effect of the change from play by play telegraphy to television the games Judge Frank said:

"There is, however, another important distinction on which I think we might rely, were another distinction necessary: In that earlier case, persons in other states received, via the telegraph, mere accounts of the games as told by others, while here we have the very substantially different fact of instant and direct interstate transmission, via television, of the games as they are being played, so that audiences in other states have the experience of being virtually

present at these games. That degree of difference, known to any one who has ever set at the receiving end of a television set, is so great as to constitute a difference in kind."

*Gardella v. Chandler*, 172 Fed 2d 402, at 412.

(c) Respondents Have Attacked Judge Hand's Opinion in Gardella, Chandler 172 Fed. Jud. 402.

(c) Respondents have attacked Judge Hand's opinion on three grounds:

First they say he has ignored the fact that baseball is not trade or commerce—the game is sport not trade. Of course, they would have us return to the completely debunked (as we have heretofore shown) practice of dissecting, isolating and labeling each activity and then ignoring the whole transaction of which it is a part.

Secondly, they state Judge Hand's opinion fails to distinguish between the reporting of an event and the event itself. Again they ask us to ignore the whole transaction and focus all our attention on the separate individual components of that transaction. They state that a great newspaper being sold in many states is undoubtedly in interstate commerce, yet this does not make the event reported therein one of interstate commerce. How different, however, is the situation in baseball where the event is part of a vast business, and is carefully scheduled to happen and the reporting rights are sold at fabulous prices and are themselves used as part of interstate commercial advertising.

Third, Judge Hand used an unfortunate metaphor in describing the broadcasting of baseball games. He stated

that it appeared to be the same as that which would exist at a ball park where a state line ran between the diamond and grandstand. Respondents cite to show his error.

*Hopkins v. United States*, 171 US 578 and *Anderson v. United States*, 171 US 604

where it was held that sales of cattle in Kansas City stockyards were local sales and did not become impressed with an interstate character because the Kansas-Missouri state line ran through the stockyards, and cattle so bought or sold might be moved across that line.

In the Hopkins case the Court says:

> "The erection of the building and putting up of the stock pens upon ground through which the state line ran were matters of no moment so far as any question of interstate commerce is concerned. The character of the business done is not in the least altered by these immaterial and incidental facts."

*Hopkins v. United States*, 171 US 578, 603.

Of course, in radio and television broadcasting of baseball games the fact the state state line runs between the transmitter and the receiving set is a matter of great moment, for if it were not so radio and television themselves could not be considered interstate commerce. To baseball it is a moment of several million dollars revenue.

We must agree that the defendants (respondents) are pro tanto engaged in interstate commerce.

*Gardella v. Chandler*, 172 Fed 2d 402-408.

## VI

## POLICY ARGUMENTS

**(a) Unique Position of Baseball Does Not Justify Judicial Legislation.**

(a) It is argued that baseball requires special consideration under the Anti-Trust Laws, because such a team sport cannot exist in completely free economic competition.

That may be true but it is no argument whatsoever that baseball is not within the federal jurisdiction. To uphold the Federal Baseball case on such grounds would give organized professional baseball a carte blanche immunity to all otherwise illegal restraints on competition in the baseball industry whether they are necessary to the unique character of the industry or not.

Secondly, the legality of many of the alleged restraints practiced in organized baseball may be established by the rule of reason. (*Board of Trade v. United States* 246 US 231). For instance as to the controversial reserve clause the Congressional Sub-Committee Reports:

> "Organized baseball, represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause will be tested by the rule of reason. Though lawsuits have been filed against organized baseball in recent years, in none of them has the court yet passed on the reasonableness of the reserve clause."

Eighty-second Congress House of Representatives—Committe on the Judiciary—Sub-Committee on Study of Monopoly Power Report supra at page 231.

Obviously then no carte blanche immunity is needed. Each alleged restraint can be tested on its merits under the rule of reason.

Thirdly, this Court cannot, under our Constitution, legislate in favor or against organized baseball. The Congress is aware of baseball's problems and investigating them with the view toward necessary action. There is certainly no reason for the Court here to usurp the legislative power of Congress and exempt professional baseball from the Anti-Trust Acts.

(b) Basic American Principles Require Baseball Be Held Subject to Federal Jurisdiction.

(b) On a basis of policy this Court should hold this super organization—this super government—subject to federal jurisdiction. The reasons for this are best stated by Judge Frank in *Gordella v. Chandler*, 172 Fed 2d 402, at 409:

> "For reasons stated later, I think that, on its facts, we can properly distinguish the suit now before us from the Federal Baseball case.
>
> "I think it should be so distinguished, if possible, because (assuming, as we must, at this stage of the litigation, the truth of the statements in the complaint) we have here a monopoly which, in its effect on ball-players like the plaintiff, possess characteristics shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America, as shown by the Thirteenth Amendment to the Constitution, condemning 'involuntary servitude,' and by subsequent congressional enactments on that subject. For the 'reserve clause,'

as has been observed, results in something resembling peonage of the baseball player. By accepting the 'reserve clause'—and all players in organized baseball must 'accept' it—a player binds himself not to sign a contract with, or play for, any club other than the club which originally employs him or its assignee. Although many courts have refused to enforce the 'reserve' clause, yet severe and practically efficacious extra-legal penalties are imposed for violation. The most extreme of these penalties is the blacklisting of the player so that no club in organized baseball will hire him. In effect, this clause prevents a player from ever playing with any team other than his original employer, unless that employer consents. Since the right to play with organized baseball is indispensable to the career of a professional baseball player, violations of the clause by such players are infrequent. The violator may perhaps become a judge (with a less exciting and often less remunerative occupation) or a bartender or a street-sweeper, but his chances of ever again playing baseball are exceedingly slim.

(Not only can the ineligible one not play baseball again, but he can have no connection whatsoever with baseball. His association with anything in baseball so taints it with his ineligiblity as to bring new sanctions. He is a leper or pariah to anything connected with baseball. (R-13-15). It is carried to the extreme length in petitioner's case, that he is not even allowed to coach or teach the boys and help in the local American Legion Junior Baseball competition.) Insert Ours.

"As one court, perhaps a bit exaggeratedly, has put it, 'While the services of these baseball players are ostensibly secured by voluntary contracts a study of the system as * * * practiced under the plan of the National Agreement, reveals the involuntary character of the servitude which is imposed upon players by the strength of the combination controlling the labor of practically all of the players in the country. * * * There is no difference in principle between the system of servitude built up by the operation of this National Agreement, which * * * provides for the purchase, sale, barter, and exchange of the services of baseball players—skilled laborers—without their consent, and the system of peonage brought into the United States from Mexico and thereafter existing for a time within the territory of New Mexico. * * * The system created by 'organized baseball' in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever the will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the National Agreement.' I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.

"In what I have said about the nature of the contracts made with the players, I am not to be understood as implying that they violate the Thirteenth Amendment or the statutes enacted pursuant thereto. I mean simply to suggest that those contracts are so

opposed to the public policy of the United States that, if possible, they should be deemed within the prohibitions of the Sherman Act, 15 USCA Secs. 1-7, 15 note."

*Gardella v. Chandler,* 172 Fed 2d 402 at 409.

## CONCLUSION

The meat of this one issue is that organized professional baseball covers the entire United States. It is an organization not amenable to individual, separate state control. The commerce clause was inserted into the Constitution for the specific purpose of giving the Federal Government power to deal with just such an organization. Organized professional baseball is within the Federal Jurisdiction. The Anti-Trust Laws encompass the full jurisdiction of the Federal Government under the Commerce Clause. The subject matter of organized professional baseball is therefore within the scope of those Anti-Trust Laws, and thus the subject matter of organized professional baseball, or this action, is within the jurisdiction of the United States District Court.

Petitioner respectfully submits that the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court for further proceedings.

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